BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALISA FRANCINE STUBBLEFIELD Claimant VS. **DUFFENS OPTICAL CORP. OFFICE** Respondent AND **TRAVELERS INDEMNITY CO. OF AMER.** Insurance Carrier	)	Docket No. **1,055,568**

ORDER

Respondent and its insurance carrier request review of the July 11, 2011, Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleged bilateral knee injuries due to repetitive trauma during the course of her employment with respondent from 2000 to 2010. The Administrative Law Judge (ALJ) found claimant suffered accidental injury arising out of and in the course of employment and further found that claimant provided timely notice of her accidental injury.

Respondent requests review of whether the ALJ erred in finding claimant's accidental injury to her knees arose out of and in the course of employment as well as timely notice. Respondent argues claimant was not exposed to any increased risk for injury to her knees than her day-to-day activities outside the workplace. Respondent further argues that claimant failed to sustain her burden of proof that she gave timely notice.

Claimant argues the ALJ's Order for Medical Treatment should be affirmed.

The issues raised on appeal are whether claimant met her burden of proof to establish she suffered personal injury by accident through a series of accidental injuries. And whether claimant provided timely notice of this series of accidents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked as a lab technician with respondent for approximately 10 years. Her job was to use machines that would grind the surface of the glass or plastic lenses to be used for glasses. Claimant testified that her repetitive walking, standing, bending and squatting at work has caused her current bilateral knee problems. Her last day worked for respondent was in March 2011. Claimant testified:

> Q. And was there some point that you started noticing problems with your knees?
>
> A. Yes.
>
> Q. And when was that?
>
> A. It's been ongoing.
>
> Q. Okay.
>
> A. The last year it's just gotten really, really bad.
>
> Q. Did it get at its worse towards the end?
>
> A. Yes.[1]

Claimant sought medical treatment with Dr. Peter Lepse on March 17, 2011. She testified that Dr. Lepse recommended cortisone shots which she received the same day. The doctor further stated that if there was no improvement then an arthroscopy of both knees would be recommended.

Claimant testified that she spent the majority of her time standing while running machines. She further testified that she had to squat and bend to reach tools which occurred about six times an hour. Before her appointment with Dr. Lepse, claimant had squatted down to pick up some tools and was not able to get back up without some help.

After claimant scheduled her appointment with Dr. Lepse, she advised Mike Barnes and Ken Beaver that she needed time off to go to the doctor. She didn't say anything to them about her work being the cause of her knee pain.

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[1] P.H. Trans. at 8.

At the request of claimant's attorney, Dr. Daniel Zimmerman examined and evaluated claimant on June 7, 2011. The doctor reviewed the medical records provided and requested x-rays of both knees. The x-rays of both knees demonstrated preservation of the medial and lateral joint interspaces, no osteoarthritic changes, chondromalacia change affecting the undersurface of the patellas and synovial fluid in both subpatellar bursas. Dr. Zimmerman recommended regular dosings of a nonsteroidal anti-inflammatory medication to reduce inflammation in the knees which would hopefully reduce her pain and discomfort as well. The doctor also noted that steroid injections and local anesthetic are acceptable treatment as well as claimant being a candidate for bilateral knee arthroscopies. Dr. Zimmerman diagnosed claimant as having developed bilateral chondromalacia and that she was not at maximum medical improvement.

Dr. Zimmerman opined:

> Mrs. Stubblefield developed pain and discomfort affecting the right and left knees in carrying out repetitive work duties in her employment at Duffen's Optical as discussed in this report and as is discussed in the report dated March 17, 2011 from the office of Peter S. Lepse, M.D.[2]

The doctor further opined:

> To reiterate, Mrs. Stubblefield, standing on her feet throughout her 8-hour work shift and ascending and descending a flight of steps to retrieve materials needed in carrying out her job duties on a repetitive basis in carrying out work duties at Duffen's Optical, developed chondromalacia affecting the right and left knees. She is not at this time at maximum medical improvement.[3]

Mike Klutz, respondent's general manager, oversees approximately 45 employees every day that are working for Duffen's Optical. Mr. Klutz agreed that claimant accurately described her job activities. Mr. Klutz testified that the first time he became aware of claimant's work-related injury was when he received a letter on April 18, 2011, from claimant's attorney.

Initially, respondent argues that claimant failed to provide timely notice of her alleged accidental injuries. But before that issue can be addressed, the appropriate accident date for claimant's alleged repetitive trauma injuries must first be determined. K.S.A. 44-508(d) provides, in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the

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[2] P.H. Trans., Cl. Ex. 1 at 5.

[3] *Id.*

> authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. . . .

Claimant alleges she injured her knees as the result of cumulative trauma. By definition cumulative trauma injuries occur over a period of time. Designating only one date as the date of accident for a cumulative trauma injury is a legal fiction. Nonetheless, the Workers Compensation Act provides a solution in K.S.A. 44-508(d). The evidence establishes that claimant's date of accident for her alleged cumulative trauma injuries was the date that respondent received *written notice* of claimant's accident on April 18, 2011. At this juncture there is no evidence that any other of the criteria set forth in K.S.A. 44-508(d) were met. Consequently, the undersigned affirms the ALJ's finding that claimant provided respondent with timely notice of the accidental injury as the written notice respondent received triggered or set the accident date under K.S.A. 44-508(d).

Although it may seem somewhat unusual to have a date of accident that falls after the last day actually worked, that is the result of the literal interpretation of the statute. In the recent *Saylor*[4] decision, the Kansas Supreme Court made it clear that where accidental injury is due to cumulative trauma and the employer gives written notice of the injury, the date upon which the employee gives written notice to the employer of the injury shall be the date of accident regardless of whether that date may be after the last day the employee worked for the employer.

Respondent next argues claimant failed to establish that she suffered accidental injury arising out of and in the course of her employment. Respondent argues that claimant's standing, bending and climbing stairs at work did not cause any increased risk of injury than claimant might have performing those same activities outside of work.

In the recent *Bryant*[5] decision, the Kansas Supreme Court noted that in the determination of whether an injury arises out of employment the focus of inquiry is whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The analysis is not on an isolated movement such as bending, twisting, lifting, walking

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[4] *Saylor v. Westar Energy, Inc.,* ___ Kan. ___, 256 P.3d 828, (2011).

[5] *Bryant v. Midwest Staff Solutions, Inc.*, ___Kan.___, ___P.3d___, (2011).

or other body motions but instead focuses on the overall context of what the worker was doing performing the work-related activities.

In this instance, the claimant identified that she stood while performing her work activities, occasionally bending and stooping for tools as well as occasionally taking stairs to get tools. She further testified that as she performed those job duties her knees progressively became more painful. Dr. Zimmerman opined claimant developed chondromalacia affecting the right and left knees from standing on her feet throughout her 8-hour work shift and ascending and descending a flight of steps to retrieve materials needed in carrying out her job duties for respondent. The undersigned Board Member finds claimant has met her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated July 11, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of August, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[6] K.S.A. 44-534a.

[7] K.S.A. 2010 Supp. 44-555c(k).